82-1016
NO.

# In the Supreme Court of the United States

OCTOBER TERM, 1982

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board or a Circuit Court of Appeals errs in disregarding a clear, unambiguous arbitral interpretation of a collective bargaining agreement and substituting its own contrary interpretation.

2. Whether union officials may be held to a higher accountability than rank-and-file employees to uphold a no-strike pledge of a collective bargaining agreement by not participating in wildcat strikes, and whether an employer commits an unfair labor practice by selectively disciplining union officials for participating in wildcat strikes.

3. Whether the United States Court of Appeals for the Fifth Circuit erred in affirming the National Labor Relations Board's decision on a ground not relied upon by the Board rather than remanding the case to the Board for further proceedings in light of the rule enunciated by the Fifth Circuit.

## STATEMENT OF INTERESTED PARTIES

SOUTH CENTRAL BELL TELEPHONE COMPANY is the Petitioner in this action. It is a wholly owned subsidiary of American Telephone and Telegraph Company (AT&T). Western Electric Company, Incorporated ("Western Electric") is a wholly owned subsidiary of AT&T. Western Electric and AT&T jointly own Bell Telephone Laboratories, Incorporated. AT&T owns all or a part of the stock of the following twenty-three operating telephone companies: Cincinnati Bell, Inc.; Illinois Bell Telephone Company; Indiana Bell Telephone Company, Incorporated; Michigan Bell Telephone Company; New England Telephone & Telegraph Company; New Jersey Bell Telephone Company; New York Telephone Company; Northwestern Bell Telephone Company; Pacific Northwest Bell Telephone Company; South Central Bell Telephone Company; Southern Bell Telephone and Telegraph Company; Southwestern Bell Telephone Company; The Bell Telephone Company of Pennsylvania; The Chesapeake and Potomac Telephone Company of Maryland; The Chesapeake and Potomac Telephone Company of Virginia; The Cheasapeake and Potomac Telephone Company (Washington, D.C.); The Cheasapeake and Potomac Telephone Company of West Virginia; The Diamond State Telephone Company; The Mountain States Telephone and Telegraph Company; The Ohio Bell Telephone Company; The Pacific Telephone and Telegraph Company (including Bell Telephone Co. of Nevada); The Southern New England Telephone Company; and Wisconsin Telephone Company.

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**National Labor Relations Act:**

Section 8 (a)(1), 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(1) (1976):

> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7;
>
> ...."

Section 8(a)(3), 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(3) (1976) [in pertinent part]:

> "(a) It shall be an unfair labor practice for an employer—
>
> ...
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
>
> ...."

**Labor-Management Relations Act of 1947:**

Section 203(d), 61 Stat. 153 (1947), 29 U.S.C. §173(d)

(1976) [in pertinent part]:

> "(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

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## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 688 F.2d 345 (5th Cir. 1982). The Decision and Order of the National Labor Relations Board is reported at 254 N.L.R.B. 315 (1981).

## JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1982. Petitioner's Request for Rehearing was denied by order of the Court of Appeals on November 2, 1982.

## STATEMENT OF THE CASE

This case arose out of a wildcat strike which occurred during July and August of 1979 at Petitioner's Hammond, Louisiana facility. South Central Bell Telephone Company ("Petitioner" or "South Central Bell") is engaged in the business of providing telecommunication services to five southern states.[1] Petitioner and the Union[2] were parties to a collective bargaining agreement which was in force from August 7, 1977 through August 9, 1980 and which covered, among others, the employees working at Petitioner's Hammond, Louisiana facility. On July 31, 1979, 21 of the 23 unit employees scheduled to work at the Hammond facility called in sick. On August 1, 1979, 19 of the 23 again called in sick. Believing that the employees had engaged in a strike in violation of the collective bargaining agreement's no-strike provision, Petitioner gave two-day suspensions to all employees who were absent for one day and four-day suspensions to all employees who were absent both days. The five union stewards who participated in the work stoppage were suspended for an additional five days.

On a prior occasion, in 1972, Petitioner disciplined union stewards more severely than rank-and-file employees for participating in a one day strike at Petitioner's Columbia, Tennessee facility in violation of the collective bargain-

[1] Louisiana, Kentucky, Mississippi, Tennessee, and Alabama.

[2] Communications Workers of America, AFL-CIO.

ing agreement's no-strike provision.[3] This differential treatment became the subject of a grievance which was resolved through arbitration pursuant to the agreement then in effect between Petitioner and Union. In a decision dated February 28, 1974, to which the Petitioner and Union were parties, Arbitrator Patrick J. Fisher upheld the disparate discipline of stewards, finding that "because of their official positions they [the stewards] had a higher degree of responsibility and...a more severe penalty is appropriate."[4]

Subsequent to this 1974 decision the parties renegotiated their collective bargaining agreement without changing the language of the no-strike clause or the mutual responsibility clause.

As a result of the harsher penalty imposed on stewards in 1979, the Union filed unfair labor practice charges with the National Labor Relations Board, alleging violations of §§8(a)(3) and (1) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. §158(a)(3) and (1). The

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[3] The same agreement covers employees at the Columbia and Hammond facilities.

[4] At the time of this decision the contract contained a general no-strike pledge and a "mutual responsibility clause", Art. 28.01 which provided, in pertinent part that in the "best interests of both parties, the employees and the public"...

> *the Union and their respective representatives at all levels will apply the terms of this Contract fairly in accord with its intent and meaning* and consistent with the Union's status as exclusive bargaining representative of all employees in the unit. (Emphasis added).

Board found any selective discipline imposed on stewards for participating in a wildcat strike violated §§8(a)(1) and (3) of the National Labor Relations Act—a *per se* rule of liability. The United States Court of Appeals for the Fifth Circuit enforced the Board's order, although on different grounds than those relied on by the Board, and notwithstanding the prior arbitration decision interpreting Petitioner's collective bargaining agreement to permit selective discipline of union officials who engage in wildcat work stoppages.

The decision of the Fifth Circuit is in conflict with the decision of the United States Court of Appeals for the District of Columbia in *Fournelle v. NLRB,* 670 F.2d 331 (D.C.Cir. 1982) where, on indistinguishable facts, the Court held that the Board was not free to ignore a prior arbitrator's decision in deciding the legality of the employer's actions.

In the instant case the Fifth Circuit rejected the *per se* rule announced by the Board and held that in order to impose extra discipline on stewards, there must be clear and unequivocal contractual authority for same. The Court found that an arbitrator's decision could not be relied upon to provide such authority. The Court further found that the language of the collective bargaining agreement did not impose a responsibility on stewards not to engage in wildcat strikes, thereby substituting its interpretation for that of Arbitrator Fisher.

The issues decided by the Fifth Circuit are presently pending before this Court. The issue of whether a prior arbitration award is sufficient authority upon which to base disparate discipline of union stewards who engage in wildcat strikes is before this Court on writ of certiorari in the case of *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3d Cir. 1981) *cert. granted*, 102 S.Ct. 2926 (1982). Also at issue in *Metropolitan Edison* is whether stewards may be given harsher discipline, in the absence of any contractual authority when they engage in wildcat strikes. *Metropolitan Edison*, which was decided by the Third Circuit Court of Appeals, is virtually on all fours with the case at hand.

*Metropolitan Edison* is scheduled for oral argument on January 11, 1983 at 11:00 A.M. Petitioner recognizes there is not sufficient time to request this Court hear its case in conjunction with *Metropolitan Edison* pursuant to Supreme Court Rule 19.4, although the cases involve identical and closely related questions.[5] Nevertheless, Petitioner asks this Court to grant certiorari as the issues in this case present important federal questions concerning the continued viability of arbitration as a mechanism for resolving industrial disputes and the rights and responsibilities of union stewards. In the alternative, Petitioner asks this Court to hold in abeyance its decision to grant

[5] Petitioner had sought to stay the mandate of the Fifth Circuit pending the Court's decision in *Metropolitan Edison* which should be dispositive of the issues herein. The Fifth Circuit denied the stay, leaving Petitioner no alternative but to Petition for Certiorari so as to prevent issuance of mandate prior to this Court's decision in *Metropolitan Edison*.

certiorari in the instant case pending the outcome of *Metropolitan Edison* which should be dispositive of the case at hand. Denial of certiorari in this case prior to issuance of the decision in *Metropolitan Edison* would automatically trigger the mandate of the Fifth Circuit and leave Petitioner with no remedy in a case identical to one in which this Court granted certiorari.

Finally, Petitioner seeks review of the Fifth Circuit's affirmance of the Board's decision on a ground not relied upon by the Board, rather than remanding the case to the Board for further proceedings. This action by the Fifth Circuit is totally contrary to the decisions of this Court in *NLRB v. Enterprise Association of Steam*, 429 U.S. 507 (1977) and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

## REASONS FOR GRANTING THE WRIT

### I. The Decisions Of The United States Circuit Courts Are In Conflict With Respect To The Authority Of The NLRB Or A Court To Substitute Its Interpretation Of A Collective Bargaining Agreement For That Of An Arbitrator.

The cases of *Metropolitan Edison v. NLRB*, 663 F.2d 478 (3d Cir. 1981) *cert. granted*, 102 S.Ct. 2926 (1982); *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982), and *NLRB v. South Central Bell*, 688 F.2d 345 (5th Cir. 1982) involved work stoppages in violation of contractual no-

strike clauses wherein the employer disciplined participating union officials more severely than rank-and-file employees. In all these cases the employer relied on prior arbitral interpretations of the contract recognizing a greater duty of union officials to comply with the no-strike clause. Notwithstanding these arbitral interpretations, the Board ruled in each case the employers violated §§8(a)(1) and (3) of the NLRA—a *per se* rule that disparate discipline can never be imposed.

On review, all three circuit courts have rejected the Board's *per se* rule and held that a collective bargaining agreement may impose on union officials a special duty to comply with a no-strike pledge and permit selective discipline of an official for a breach of that duty. The Third and Fifth Circuits differ from the D.C. Circuit as to whether the contract must contain explicit language imposing a special duty or whether an arbitral interpretation of the agreement can establish a higher degree of responsibility. The Fifth Circuit, in the instant case, found an unfair labor practice because, in its view, only an express and unmistakable contractual waiver of the officer's statutory protection would suffice.[6]

The D.C. Circuit, on the other hand, properly re-

[6] The Court found that a prior arbitrator's decision could not be such a waiver. It also held that the language in Art. 28.01 of the collective bargaining agreement (Fn. 4, *supra*.) did not constitute such a waiver even though that same clause was contained in the prior contract upon which Arbitrator Fisher based his decision that stewards could be selectively disciplined for participating in a wildcat strike.

jects the Fifth Circuit's position, finding

> [t]he parties to the collective bargaining agreement in the present case would no doubt be highly displeased if arbitral *stare decisis* were as inconstant a doctrine as Fournelle and the Board would have us believe. The whole function of arbitration as a 'vehicle by which meaning and content are given to the collective bargaining agreement' would be impaired if the parties could not rely on a settled construction of their agreement.

*Fournelle, supra* at 345.

The views of the Fifth Circuit are erroneous as they conflict with fundamental federal labor policy under which arbitrators are given the task of filling in the inevitable gaps in collective bargaining agreements. Collective bargaining lies at the very heart of our national labor policy as the self-rule for the government of an industry or plant. However, recognizing collective bargaining agreements cannot be worded so as to cover every conceivable dispute, where there is a dispute under the agreement, it is the congressional intent that arbitration be the method of resolution. 29 U.S.C. §173(d). Further, the Supreme Court has recognized the special expertise of arbitrators in interpreting collective bargaining agreements. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Because of Congress' mandate and this Court's recognition of the special expertise of arbitrators in inter-

preting collective bargaining agreements, arbitrators' decisions are given special deference. *See United Steelworkers of America v. Warrior & Gulf Navigation Co., supra.* at 582 (1960). Courts do not review the merits of arbitration awards and they will enforce the awards even when the courts themselves would have reached a different result. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-63 (1976); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). Accordingly, an arbitrator's decision must be viewed by the courts as an integral part of the agreement.

Based on the principles enunciated in the *Steelworkers Trilogy,* [7] the Court of Appeals for the District of Columbia Court found the arbitral interpretation of a collective bargaining agreement binding on the Board and courts. The District of Columbia stated:

> The question here is whether, on the one hand, the Board and Courts should read the agreement in accordance with the clear ruling of the arbitrator or, on the other hand, should substitute their interpretation for the aribtrator's. We conclude...that the Board erred in ignoring the arbitral interpretation of the contract.

*Fournelle, supra* at 344.

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[7] *United Steelworkers v. Warrior & Gulf Navigation Co., supra.; United Steelworkers v. American Mfg. Co., supra;* and *United Steelworkers v. Enterprise Wheel & Car Corp., supra.*

Thus, the D.C. Circuit Court in *Fournelle* held that

> the collective bargaining agreement, including the authoritative interpretation of the arbitrator, imposes special duties on union officials during unauthorized strikes and permits the employer's selective punishment of union officials who flaunt those duties.

*Id.* at 345.

The *Fournelle* view of the role and long-term impact of arbitration is consistent with the stance of the *Steelworkers Trilogy* and Congress' expressed intention regarding the paramount role of arbitration as the method of resolution of disputes under collective bargaining agreements. The Fifth Circuit, however, in affirmance of the Board, failed to give effect to the arbitral interpretation and construed the contract to the contrary. In construing the contract to the contrary, the Court usurped the function specifically reserved to the arbitrator under *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).[8]

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[8] Petitioner and the Union bargained for the arbitrator's interpretation of the contract, not the Board's or the Fifth Circuit's. They should receive the benefit of that bargain. *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. at 599.

Parties to collective bargaining agreements constantly rely on arbitral decisions to determine their future actions. Both the Board and the Fifth Circuit ignored this fundamental practicality of industrial relations in their decisions. Rejection of arbitral decisions greatly destabilizes the industrial environment and conflicts with an underlying policy of the Act which is to stabilize industrial relations.

In the instant case, the existence of the union stewards' special duty under the contract to uphold the no-strike pledge by not participating in a strike against Petitioner was expressly recognized by Arbitrator Fisher in a previous case. Since arbitration has been recognized as part of the continuing bargaining process, Arbitrator Fisher's decision effectively became a binding and integral part of the collective bargaining agreement and continued to be the law of the contract at the time of the events presently under the Court's consideration.

The parties' bargaining history evidences their intention that the 1974 arbitrator's decision be binding in futuro. The parties negotiated two agreements subsequent to the agreement upon which the arbitration decision was based without modifying the language of the no-strike or mutual responsibility clauses. Their failure to modify the contract strongly infers that the parties incorporated the arbitrator's decision in their subsequent contract. *Carbon Fuel Co. v. United Mine Workers,* 444 U.S. 212, 222 (1979).[9]

[9] Moreover, South Central Bell's and the Union's actions in negotiating an expedited arbitration clause in their 1977 agreement confirms their intent that non-expedited arbitration decisions have precedential effect. In their 1977 agreement, the parties negotiated a provision allowing arbitration over disciplinary actions to proceed through an expedited arbitration process. Under that process, an arbitrator's decision would not constitute a precedent for other cases or grievances unless the decision was adopted by the written concurrence of the parties. (*South Central Bell, supra* at 352-53). The parties' express decision in 1977 to negate precedential effect of arbitration decisions under the new expedited process proves, by compelling negative inference, their prior agreement to give precedential effect to all arbitration decisions rendered under the ordinary grievance-arbitration pro-

We would therefore respectfully submit that the Board and the Court of Appeals for the Fifth Circuit erred by substituting is own interpretation of the collective bargaining agreement for that of the arbitrator.

**II. An Important Question Of Labor Law Exists As To Whether Fundamental Policy Considerations Require Union Stewards Be Held To A Higher Standard Of Accountability Than Rank-And-File Employees For Participating In An Unauthorized Strike.**

Apart from the contractually imposed obligations set forth above, union officials may be selectively disciplined for striking illegally because of their inherently higher responsibility to ensure that the union's no-strike commitment is honored by employees. This principle was long recognized by the Board.[10]

The importance of a union steward's role in contract administration cannot be overestimated. The steward serves an important statutory purpose by promoting the effective administration of the collective bargaining agreement. *Dairylea Cooperative, Inc.*, 219 N.L.R.B. 656, at

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(Footnote 9 continued)
cedure. Arbitrator Fisher's decision was rendered under the ordinary grievance format. Thus, the Fifth Circuit's conclusion that the 1977 agreement concerning expedited arbitration somehow changed the intent of the parties with respect to the precedential effect of the 1974 arbitral decision is incorrect.

[10] *See i.e. Chrysler Corp.*, 232 N.L.R.B. No. 74 (1977); *University Overland Express, Inc.*, 129 N.L.R.B. 82 (1960); *Stockham Pipe Fittings Co.*, 84 N.L.R.B. 629 (1949).

658 (1975), *enforced sub nom., NLRB v. Milk Drivers & Dairy Employees,* 531 F.2d 1162 (2d Cir. 1976).[11]

Moreover, because of the stewards' position of knowledge, responsibility, and leadership in the administration of the contract, rank-and-file employees naturally look to the stewards for guidance and advice as to their rights and obligations under the collective bargaining agreement. *See NLRB v. Weingarten, Inc.,* 420 U.S. 251 (1975). They are, in the eyes of most employees, "the union". Thus, the words and actions of the union stewards are necessarily taken more seriously than the same words or acts from rank-and-file employees and their participation in a wildcat strike is viewed by employees as a signal that the strike is lawful. This principle has been recognized in prior Board decisions, yet inexplicably it was not applied in the instant case. *See e.g. Midwest Precision Castings Co.,* 244 N.L.R.B. No. 63 (1979).

The stewards' participation in the wildcat strike before this Court "provided this action with [their] active approval and encouragement...." *Chrysler Corporation,*

[11] The Board has recognized the importance of stewards in maintaining stability in the industrial sphere by approving the concept of "superseniority" for shop stewards. See e.g., *United Electrical, Radio and Machine Workers of America, Local 623 (Limpco Mfg., Inc.),* 230 N.L.R.B. No. 59, at 407 (1977); *Motion Picture Laboratory Technicians, Local 780,* 227 N.L.R.B. No. 79 at 559 (1976). Superseniority is nothing more than a blatant form of discrimination in favor of union officials which is permitted because continuity of representation and uniform contract administration are essential to maintaining stability in the collective bargaining relationship. Thus, the literal language of §8(a)(3) of the Act gives way to the overriding policy favoring industrial stability. The same rationale should apply herein.

*Dodge Truck Plant*, 232 N.L.R.B. No. 74, at 475 (1977); *see also NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 56 (8th Cir. 1981).

As front-line representatives of the union with a close rapport with the other employees, union stewards are obviously in the best position to avert an unauthorized strike. *Gould, Inc. v. NLRB*, 612 F.2d 728, 734 (3rd Cir. 1979), *cert. denied*, 449 U.S. 890 (1980). Anything that increases their incentive to meet this challenge increases the likelihood that wildcat strikes will be avoided through their efforts. Thus, singling out union stewards for extra discipline is a very effective deterrent to wildcat strikes.[12]

It is especially important to an employer to have a means of deterring wildcat strikes since his after-the-fact "remedies" are largely illusory. *See Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981) (Powell, J., concurring).

The Board's decisions on the issue of a steward's responsibility in wildcat strike situations have been marked by inconsistencies. This constant shifting by the Board has tended to obfuscate employers' rights and stewards' responsibilities.[13]

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[12] Stewards who engage in wildcat strikes are not engaged in protected activity. Thus, the imposition of harsher discipline on union stewards is not inherently destructive of employee rights, but rather it encourages lawful union activity. *Indiana & Michigan Electric Co.*, 599 F.2d 227, 232 (7th Cir. 1979).

[13] *Compare Super Value Xenia*, 228 N.L.R.B. No. 156, at 1259 (1977) (mere participation by stewards warrants discipline); *Chrysler*

The Board's current position in this matter is not entitled to deference as its rulings have been inconsistent. *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944). Reviewing courts need not rubber-stamp decisions of the Board that frustrate congressional policy underlying a statute. *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965).

The Circuit Courts that have considered the issue of union officers' responsibility under similar circumstances recognize the inconsistent approach taken by the Board when confronted with situations similar to that presently before this Court. *NLRB v. Armour-Dial, Inc., supra.* at 55 (8th Cir. 1981); *Gould, Inc. v. NLRB, supra.* at 732, n.4 (3d Cir. 1979); *Indiana v. Michigan Electric Co. v. NLRB*, 599 F.2d 227, 230-31 (7th Cir. 1979).

Moreover, the Circuit Courts have consistently rejected the Board's "per se" rule first announced in *Precision Castings Co.*, 233 N.L.R.B. 183 (1977) that union officials cannot be selectively disciplined for an illegal work stoppage even if the contract imposes additional respon-

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(Footnote 13 continued)
*Corp., Dodge Truck Plant*, 232 N.L.R.B. No. 74 (1977) (steward who "exercised a leadership role" in an unlawful walkout warrants discharge); *Russell Parking Co.*, 133 N.L.R.B. 194 (1961) (Board upheld discharge of steward who merely participated in unlawful work stoppage); *University Overland Express, Inc.*, 129 N.L.R.B. 82 (1960) (status as union officials as a proper factor on which to base more severe disciplinary action); *with Precision Castings Co.*, 233 N.L.R.B. No. 35 (1977) (the Board adopted a per se rule that selective discipline can never be imposed). *See also* the Board's most recent decision *Consolidation Coal Company*, 263 N.L.R.B. No. 188 (1982) (In a 2-1-2 decision, a divided Board held union officials cannot be disciplined more harshly than rank-and-file employees).

sibility on the stewards.[14] To date, each of the courts of appeal which has addressed this "per se" rule has rejected it, although they have articulated divergent standards.[15]

It is evident that the current state of the law in this area is extremely confused and raises an important question of federal law which should be settled by the Supreme Court in order to resolve the inconsistencies among the Board and courts of appeals' decisions.

The policy of industrial stability underlying the Act compels resolution of this issue by adopting the view that even in the absence of contractual authority, union stewards may be held to a higher standard of accountability and disparate discipline will not constitute a violation of the Act.

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[14] *See* footnote 12.

[15] *See e.g., Indiana v. Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979) (the Court held extra discipline of a union official was based upon a breach of higher responsibility accompanying their status as a matter of law); *C.H. Heist Corp. v. NLRB*, 657 F.2d 178 (7th Cir. 1981) (the Court appeared to move toward the view that there must be at least some contractual basis for the imposition of more severe discipline); *Gould, Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979) *cert. den.*, 449 U.S. 890 (1980) (the Court adopted the reasoning of *Indiana and Michigan Electric* finding the discharge of a union steward was justified under the obligations explicitly set forth in the contract); *Hammermill Paper Co. v. NLRB*, 658 F.2d 155 (3d Cir. 1981) (the Court held the increased responsibility does not arise purely by operation of law, but must have a basis in contract); *Metropolitan Edison v. NLRB*, 663 F.2d 478 (3d Cir. 1981), *cert. granted*, 102 S.Ct. 2926 (1982) (the Third Circuit narrowed its approach even more, stating it will recognize added responsibility only where there is clear contractual language); *but see NLRB v. Armour-Dial, Inc.*, 638 F.2d 51 (8th Cir. 1981) (the Court takes the broadest approach in recognizing an inherent greater responsibility on union officials).

**III. The United States Court Of Appeals For The Fifth Circuit Erred In Affirming The National Labor Relations Board's Decision On A Ground Not Relied Upon By The Board Rather Than Remanding The Case To The Board For Further Proceedings In Light Of The Rule Enunciated By The Fifth Circuit.**

In the instant case the Board, by not deferring to the arbitrator, adhered to a *per se* rule that disparate discipline can never be imposed. The United States Court of Appeals for the Fifth Circuit specifically found the *per se* rule to be incorrect. See *NLRB v. South Central Bell Telephone Co.*, 688 F.2d at 352. However, the Fifth Circuit upheld the decision of the Board on other grounds. The Court specifically decided what it perceived to be the correct standard of law to apply with respect to waiver of statutory rights and then applied the law to the facts without first allowing the Board to do so. Such action is contrary to controlling Supreme Court precedent.

In *NLRB v. Enterprise Association of Steam*, 429 U.S. 507, 522 n.9 (1977), the Supreme Court stated:

> [A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which this action can be sustained.' ... This rule has not been disturbed...When an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and, after doing so to remand the case to

> the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law. (Citations omitted).

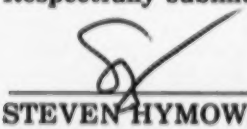
This rule was recently reaffirmed. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 101 S.Ct. 2573 at 2577, n.6 (1981).

The rationale set forth in these cases is clearly applicable to the instant set of facts. As previously stated, the Court found that the Board applied the wrong standard. Thus, the proper course of action should have been to remand the case to the Board in light of the proper standard.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue. In the alternative, if a writ does not issue, the decision on the writ should be held in abeyance pending this Court's decision in *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3d Cir. 1981) *cert. granted*, 102 S.Ct. 2926 (1982).

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, STEVEN HYMOWITZ, hereby certify that I have on December 15, 1982, by United States Mail, postage prepaid, served (3) copies of the foregoing petition upon all parties required to be served, their names and addresses being as follows:

Fred A. Lewis
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National Labor Relations Board,
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Deputy Associate General Counsel,
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STEVEN HYMOWITZ

## APPENDIX "A"

**NATIONAL LABOR RELATIONS BOARD,**
**Petitioner,**

**v.**

**SOUTH CENTRAL BELL TELEPHONE COMPANY,**
**Respondent.**

**No. 81-4159.**

**United States Court of Appeals,**
**Fifth Circuit.**

**Oct. 4, 1982.**

National Labor Relations Board sought enforcement of order against employer holding that employer by singling out union stewards for longer suspensions than other employees for strike participation was unfair labor practice. The Court of Appeals, Gee, Circuit Judge, held that: (1) Board's per se rule that union officers' protected status cannot be bargained away was contrary to Supreme Court's holdings, and Board abused its discretion by not following the Court's rule; but (2) under proper construction of collective bargaining agreement, there was no meeting of minds as to effect of 1974 arbitration decision that union stewards could be more severely punished than other union members for strike participation, and Board correctly declined to defer to such decision; and (3) absent specific contractual obligations to the contrary, union officers may not be disparately disciplined for mere participation in or failure to take affirmative steps to end an

illegal stoppage.

Order enforced.

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Elliott Moore, Deputy Assoc. Gen. Counsel, N.L.R.B., Candace M. Carroll, John E. Higgins, Jr., Robert G. Sewell, Washington, D.C., for petitioner.

John C. Carey, Jr., Birmingham, Ala., Robert Sutherland, Robert K. McCalla, Steven Hymowitz, New Orleans, La., for respondent.

Application for Enforcement of an Order of the National Labor Relations Board.

Before BROWN, GEE, and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

The National Labor Relations Board ("Board") petitions us for enforcement of its order of January 14, 1981, against South Central Bell Telephone Company ("Bell"), 254 N.L.R.B. 315 (1981). That order held Bell in violation of section 8(a)(1) and (3) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(1) and (3) (1976), for singling out union stewards for longer suspensions when punishing some of its employees for participation in a strike that transgressed a contractual no-strike clause. We enforce.

## I. FACTS AND DISPOSITION BELOW.

The facts in this case are undisputed. Bell, one of the 19 companies associated with American Telephone & Telegraph, provides telecommunications services to five southern states, Alabama, Kentucky, Louisiana, Mississippi, and Tennessee. Bell and the Communications Workers of America, AFL-CIO ("Union") were parties to a collective bargaining agreement ("contract") in force from August 7, 1977, through August 9, 1980. That contract covered, *inter alia*, employees working at Bell's Hammond, Louisiana, facility and declared in pertinent part:

> Article 21
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> ADJUSTMENT OF GRIEVANCES
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> ....
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> 21.05 A. As the parties have agreed on procedures for handling complaints and grievances, they further agree that there will be no lockouts or strikes during the life of this Agreement.
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> ....
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> Article 28
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> RESPONSIBLE UNION-COMPANY RELATIONSHIP
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> 28.01 The Company and the Union recognize that it is in the best interests of both parties, the employees and the public that all dealings between them continue to be characterized by mutual responsibility and respect. To insure that

this relationship continues and improves, the Company and the Union and their respective representatives at all levels will apply the terms of this Contract fairly in accord with its intent and meaning and consistent with the Union's status as exclusive bargaining representative of all employees in the unit. Each party shall bring to the attention of all employees in the unit, including new hires, their purpose to conduct themselves in a spirit of responsibility and respect and of the measures they have agreed upon to insure adherence to this purpose.

On July 31, 1979, 21 of 23 unit employees who were scheduled to report to work at the Hammond facility called in sick. On August 1, 1979, 19 of 23 employees who were scheduled to work at the Hammond facility again called in sick. Bell believed that these employees were engaged in an unprotected strike in violation of article 21.05A. Therefore, Bell gave two-day suspensions to all employees who were absent only on July 31, four-day suspensions to all employees who were absent on both July 31 and August 1, and additional five-day suspensions to five union stewards who had been absent on one or both of those days. Thus, Union stewards George Blades, Mike Jenkins, Ronny Neal, and Gary Stanga each received nine-day suspensions, and Union steward Sidney Alexander received a seven-day suspension. The suspension notices given to all rank-and-file employees stated: "[Name of employee] was suspended for [number] days from [date] to [date] for his participation in an unauthorized walkout. He is advised that further occurrences of this nature will result in discharge, barring unusual mitigating circumstances." The suspension

notices given to all five union stewards contained the above language, with an additional sentence stating: "The fact that [name of employee] is a union representative was taken into account in determining the length of the suspension."

In 1972, at its Columbia, Tennessee, facility, Bell had disciplined union stewards who violated a no-strike clause identical to article 21.05A in a prior contract more severely than employees who held no union office. That differential treatment was grieved as unfair and discriminatory. Because the Union and Bell could not resolve the grievance, they submitted it to an arbitrator. In 1974, the arbitrator upheld the punishment, declaring "that because of their official positions [the union stewards] had a higher degree of responsibility and a more severe punishment is appropriate." When the contract was renewed in 1977, article 21.05A was not changed, and the arbitrator's ruling was not specifically repudiated in the new contract.

After Bell's decision in this case, the Union filed unfair labor practice charges with the Board's general counsel, who issued a complaint alleging section 8(a)(1) and (3) violations. The parties waived a hearing before an administrative law judge and submitted the case to a three-member Board panel on stipulated facts. The panel acknowledged the 1974 arbitration decision but did not defer to it. It found no evidence that the stewards engaged in any activities different from those of the employees who did not hold Union office, such as urging support of the

stoppage or inducing participation in it. The stewards had "merely participated" in the unauthorized strike. The panel thus concluded that the differential treatment was based solely on the stewards' Union status, a violation of section 8(a)(1) and (3) of the Act. It ordered Bell to cease and desist from such practices, to rescind the excess suspensions, and to make the stewards whole for lost wages and benefits. 254 N.L.R.B. at 316-17.

The Board seeks enforcement of that order. This case presents two issues. First, should the Board have deferred to the 1974 arbitration decision? Second, was the differential treatment of the stewards a violation of section 8(a)(1) and (3) of the Act?

## II. THE 1974 ARBITRATION DECISION

[1,2] Bell contends that the 1974 decision is an integral and binding part of the 1977 contract to which this court and the Board must defer under 29 U.S.C. § 173(d)[1] as interpreted in the *Steelworkers* trilogy.[2] These authori-

[1] 29 U.S.C. § 173(d) declares:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The [Federal Mediation and Conciliation] Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

[2] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct.

ties are inapposite, since the Supreme Court long ago declared that the relationship between courts and the arbitration process, the subject of the *Steelworkers* trilogy, is "quite different" from the relationship between the Board and the arbitration process when the Board is exercising its unfair labor practice jurisdiction. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436-37, 87 S.Ct. 565, 568, 17 L.Ed.2d 495 (1967); *see also NLRB v. Strong*, 393 U.S. 357, 360-61, 89 S.Ct. 541, 544, 21 L.Ed.2d 546 (1969).[3] It is the latter relationship we review today since we are not asked to enforce directly an arbitration decision but to review the Board's refusal to do so.[4] The standards governing our review are found in 29 U.S.C. § 160(a) and in the Board's decision in *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955).

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(Footnote 2 continued)
1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

[3] Bell also places far too much reliance on § 173(d). That section, by its own language and statutory context, was originally directed primarily, if not exclusively, at the Federal Mediation and Conciliation Service, *see supra* n.1, not the Board. The *Steelworkers* trilogy applied § 173(d)'s policy to the courts, but not to the Board. *See Acme*, 385 U.S. at 436-37, 87 S.Ct. at 568. When Congress desired to alter the scope of the Board's § 160(a) unfair labor practice jurisdiction, it did so expressly. *See, e.g.*, 29 U.S.C. § 160(a) (Board permitted to cede some of its unfair labor practice jurisdiction to state agencies); 160(k) (Board permitted to defer to voluntary private adjustment of unfair labor practices arising out of jurisdictional strikes).

[4] Hence, the well-established doctrine of judicial deference to arbitration decisions when directly asked to enforce them in a private suit and those cases invoking the question of whether courts may give arbitration decisions prospective effect in a private suit do not control our disposition. *See, e.g., Oil, Chemical & Atomic Workers International Union Local 4—367 v. Rohm & Haas, Texas, Inc.*, 677 F.2d 492 (5th Cir.

Thus focused, this issue involves two related yet distinct arguments as to why the Board should defer to the 1974 arbitration decision. The first is that, since this controversy centers on the same no-strike clause at issue in 1974, that decision has binding precedential effect. Further, since the 1977 contract contained the same no-strike clause and did not specifically repudiate or limit the 1974 decision, it has been ratified by the parties and incorporated by silence into their 1977 contract.

*Precedential Effect*

[3] Section 160(a) declares in relevant part: "The Board is empowered ... to prevent any person from engaging in any unfair labor practice.... This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Under section 160(a), therefore, the Board clearly need not have deferred to the 1974 decision. However, the Board, in the exercise of its discretion, may choose to honor arbitration awards under certain circumstances. In *Spielberg*, the Board announced three criteria that would determine its "recognition" of an arbitration award: "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the

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(Footnote 4 continued)
1982) (per curiam); *W. R. Grace & Co. v. Local Union No. 759, International Union of United Rubber Workers*, 652 F.2d 1248 (5th Cir. 1981), *cert. granted*, __ U.S. __, 102 S.Ct. 3481, 73 L.Ed.2d 1365 (1982); *New Orleans S. S. Association v. General Longshore Workers*, 626 F.2d 455 (5th Cir. 1980), *aff'd sub nom. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, __ U.S. __, 102 S.Ct. 2673, 73 L.Ed.2d 327 (1982).

decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." 112 N.L.R.B. at 1082. *Spielberg* retained its vitality after the *Steelworkers* trilogy, *see, e.g., NLRB v. Plasterers' Local No. 79*, 404 U.S. 116, 136-37, 92 S.Ct. 360, 372, 30 L.Ed.2d 312 (1971), and has been endorsed by the Supreme Court and nearly all of our sister circuits.[5] We join them in approving the *Spielberg* doctrine as well.[6]

[4] It is the duty of the courts to insure Board adherence to the *Spielberg* doctrine. Six circuits have addressed the question of the standard of review used in evaluating Board application of the *Spielberg* doctrine. All agree that it is an abuse of discretion standard.[7] We agree

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[5] *See, e.g., Plasterers Local No. 79*, 404 U.S. at 136-37, 92 S.Ct. at 372; *NLRB v. Designcraft Jewel Ind.*, 675 F.2d 493, 496 (2d Cir. 1982) (per curiam); *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734, 735 (4th Cir. 1982); *Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199, 201-02 (1st Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3949 (U.S. May 22, 1982) (No. 81-2162); *NLRB v. Pincus Bros., Inc.—Maxwell*, 620 F.2d 367, 372 (3d Cir. 1980); *Bloom v. NLRB*, 603 F.2d 1015, 1018-20 (D.C.Cir.1979); *Hawaiian Hauling Serv., Ltd., v. NLRB*, 545 F.2d 674, 675-76 (9th Cir.), *cert. denied*, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1061 (1976); *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 330 (7th Cir. 1976); *John Klann Moving & Trucking Co. v. NLRB*, 411 F.2d 261, 263 (6th Cir. 1969); *Illinois Ruan Transport v. NLRB*, 404 F.2d 274, 280 (8th Cir. 1968); *NLRB v. Auburn Rubber Co.*, 384 F.2d 1, 3-4 (10th Cir. 1967).

[6] This circuit has previously indicated implicitly its approval of the *Spielberg* doctrine. *See T.I.M.E.—D.C., Inc. v. NLRB*, 504 F.2d 294, 302-03 (5th Cir. 1974); *Steve's Sash & Door v. NLRB*, 430 F.2d 1364, 1365 (5th Cir. 1970) (per curiam). *Cf. NLRB v. Railway Clerks*, 498 F.2d 1105, 1109-10 (5th Cir. 1974) (upholding prearbitration nondeferral by the Board under its *Collyer* doctrine). We take this opportunity to remove any doubt of our approval of the *Spielberg* doctrine and join the unanimous view of our sister circuits.

[7] *See, e.g., Pincus Bros.*, 620 F.2d at 372 (3d Cir.); *Hawaiian Haul-*

with these cases and adopt the abuse of discretion standard.

Having decided the standard of review, we turn to the Board's actions here. In reliance on its prior decisions, the Board declined to defer to the 1974 arbitration decision since it was repugnant to the Act, one of the three *Spielberg* criteria. *See* 254 N.L.R.B. at 317 n.4. Specifically, the decision was repugnant to the Act since the Board

> has held that it is a violation of Section 8(a)(3) and (1) of the Act for an employer to single out union stewards for discipline where the stewards merely participated in an unprotected strike along with other employees. In so concluding the Board [has] reasoned that such different treatment of stewards must necessarily be based upon the stewards' status as union officers rather than upon their conduct as employees, since the stewards had engaged in the same actions as other employees. The Board [has] held that, where a steward had not instigated or led an unprotected work stoppage, he could not be disciplined for his "lack of actions as a steward" in failing to take steps to terminate the work stoppage.

*Id.* at 317 (footnotes omitted). Thus the issue is narrowed to this question: Is this statutory interpretation an abuse of the Board's discretion?

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(Footnote 7 continued)
*ing*, 545 F.2d at 676 (9th Cir.); *Associated Press v. NLRB*, 492 F.2d 662, 666 (D.C.Cir.1974); *NLRB v. Horn & Hardart Co.*, 439 F.2d 674, 679 (2d Cir. 1971); *Auburn Rubber*, 384 F.2d at 3 (10th Cir.); *Ramsey v. NLRB*, 327 F.2d 784, 786 (7th Cir.), *cert. denied*, 377 U.S. 1003, 84 S.Ct. 1938, 12 L.Ed.2d 1054 (1964).

[5] Because Congress in section 160(a) gave the Board primary responsibility over unfair labor practices, we seek guidance on this issue from case law in areas of labor law in which the Board also has primary responsibility.

In *Ford Motor Co. v. NLRB*, 441 U.S. 488, 99 S.Ct. 1842, 60 L.Ed.2d 420 (1979), the issue before the Court was whether in-plant cafeteria and vending machine food services are "terms and conditions of employment" subject to mandatory collective bargaining. In affirming a Board decision that they are, the Court described the role of the Board in this area and the judicial deference due as a result:

> It is thus evident that Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain. This case, therefore, is one of those situations in which we should "recognize without hesitation the primary function and responsibility of the Board...," *NLRB v. Insurance Agents*, 361 U.S. 477, 499 [80 S.Ct. 419, 432, 4 L.Ed.2d 454] (1960)....
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> Of course, the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute. *NLRB v. Iron Workers*, 434 U.S. 335, 350, 98 S.Ct. 651, 660, 54 L.Ed.2d 586 (1978). In the past we have refused enforcement of Board orders where they had "no reasonable basis in law," either because the pro-

per legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning. *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166, 92 S.Ct. 383, 390, 30 L.Ed.2d 341 (1971). We have also parted company with the Board's interpretation where it was "fundamentally inconsistent with the structure of the Act" and an attempt to usurp "major policy decisions properly made by Congress." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318, 85 S.Ct. 955, 967, 13 L.Ed.2d 855 (1967). Similarly, in *NLRB v. Insurance Agents*, 361 U.S., at 499, 80 S.Ct., at 433, we could not accept the Board's application of the Act where we were convinced that the Board was moving "into a new area of regulation which Congress had not committed to it."

The Board is vulnerable on none of these grounds in this case. Construing and applying the duty to bargain and the language of § 8(d), "other terms and conditions of employment," are tasks lying at the heart of the Board's function. With all due respect to the Courts of Appeals that have held otherwise, we conclude that the Board's consistent view that in-plant food prices and services are mandatory bargaining subjects is not an unreasonable or unprincipled construction of the statute and that it should be accepted and enforced.

*Id.* at 496-97, 99 S.Ct. at 1848; *see also Charles D. Bonanno Linen Service, Inc. v. NLRB*, __ U.S. __, __, 102 S.Ct. 720, 723-24, 70 L.Ed.2d 656 (1982) (primary responsibility for resolving multiemployer bargaining problems committed to Board by Congress; judicial review of Board actions

limited); *NLRB v. L. B. Priester & Son, Inc.*, 669 F.2d 355, 359 (5th Cir. 1982).

[6] Thus the Court has variously phrased the test for deferring to the Board's statutory interpretation and decisions in areas for which it has primary responsibility. The Board's view should be sustained if it is "reasonably defensible" or "has a reasonable basis in law." Alternatively, the Board's opinion is valid if it is not "fundamentally inconsistent with the structure of the Act" or "an attempt to usurp 'major policy decisions made by Congress.' " The courts must also defer to the Board if its decision is not a movement "into a new area of regulation which Congress had not committed to it" or an "unprincipled construction of the statute." Finally, the Board's interpretation should not be "rejected merely because the courts might prefer another view of the statute."

Since the Board with this decision has clearly not moved into forbidden areas of regulation or usurped a congressional prerogative, declining to defer to the 1974 arbitration decision was not an abuse of discretion under those two criteria.

[7] As to whether the NLRB's view of the Act is principled, reasonable, and consistent with the Act, the question is somewhat more complex. The Union and the general counsel urged the Board to ground its unfair labor practice finding on the absence of affirmative duties in the contract for union officers during an illegal strike. *See* 254 N.L.R.B.

at 316. This is the view of most of the circuits that have addressed the issue and the view we adopt today. *See infra* Part III. However, the Board in this case apparently continued to adhere to its legal view that disparate discipline can *never* be imposed, even if the officers flout affirmative contractual obligations. *See* 254 N.L.R.B. at 317 & nn. 2, 3, *citing Bethelehem Steel Corp.*, 252 N.L.R.B. 982 (1980), *enforcement denied in pertinent part sub nom. Fournelle v. NLRB*, 670 F.2d 331 (D.C.Cir.1982); *Gould Corp.*, 237 N.L.R.B. 881 (1978), *enforcement denied*, 612 F.2d 728 (3d Cir. 1979); *Precision Casting Co.*, 233 N.L.R.B. 183 (1977). This is the equivalent of a *per se* rule that union officers' protected status cannot be bargained away. As the court in *Fournelle* indicated, the Board has vacillated between this *per se* view, which has been unanimously rejected by all of the courts of appeal that have considered it, and the view held by the circuit courts of appeal that protected status can be explicitly bargained away. *See* 670 F.2d at 338-41.

In Part III *infra*, we join our sister circuits in disapproving the Board's *per se* rule. However, we affirm the Board's unfair labor practice finding on another ground—that this contract does not expressly and unmistakably waive the officer's statutory protection. For the purposes of reviewing the Board's discretion to reject the 1974 decision, we hold similarly. The Board's *per se* rule is contrary to the Supreme Court's holdings that statutory protections of this type can be expressly waived in a contract. *See NLRB v. Magnovox*, 415 U.S. 322, 94 S.Ct. 1099, 39 L.Ed.2d 358 (1974); *Mastro Plastics Corp. v. NLRB*, 350

U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956). Therefore, the Board abused its discretion here by not following the Court's rule. However, since the contract at issue does not meet the standards for waiver, the Board was nonetheless correct in declining to defer.[8]

*Ratification and Incorporation by Silence*

Bell's second argument is that the 1977 contract ratified and incorporated by silence the 1974 arbitration decision. Since there is no clause in the 1977 contract that can be construed, even liberally, as expressly incorporating or ratifying the 1974 decision, we are faced with interpreting only the parties' silence. We find Bell's argument untenable for several reasons.

[8,9] We begin with the premise that judicial interpretation of silence in a document or in a law is always a tricky and controversial undertaking. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Curran*, __ U.S. __, __ __, __, 102 S.Ct. 1825, 1851-52, 72 L.Ed.2d 182 (1982) (Powell,

[8] The parties, in an attempt to bolster their arguments as to whether the Board is bound by arbitral precedent, joust over an analogous but different proposition: whether arbitrators are bound by prior arbitration decisions, *i.e., stare decisis* among arbitrators. The learned authorities are divided on this issue. *Compare, e.g.*, Elkouri & Elkouri, *How Arbitration Works* 377 (3d ed. 1973) (*stare decisis* "usually" followed between arbitrators) with, *e.g.*, Coulson, *Labor Arbitration: What You Need to Know* 69, 78 (1973) (contra); Levin & Aksen, *Arbitrating Labor Cases* 52 (1974) (same). However, because the Board operates in a statutory framework absent from private contract arbitration, we find the analogy to ths area of law quite weak and the persuasive value of the arguments equally low. We thus decline to choose between the competing views, and these authorities play no role in our disposition.

J., dissenting) (criticizing the "novel theory" that congressional intent can be inferred from its silence). This is especially true with labor contracts, since their formation is typically characterized by intense bargaining and the final contract usually represents hard-fought negotiations and compromises. Quite often, employers and unions exchange numerous quid pro quos, giving clauses and rights in direct exchange. This is particularly so in negotiations over no-strike clauses and grievance/arbitration procedures. *See American Manufacturing Co.*, 363 U.S. at 567, 80 S.Ct. at 1346. Because of this the Supreme Court has strongly cautioned courts against reading in changes or exceptions to such clauses. *See id.* They should be interpreted based on their plain and literal meaning so as to avoid interference with the private bargain.

[10,11] Thus, in this case the principle that "labor contracts generally state affirmatively what conditions the parties agree to," *Torrington Co. v. Metal Products Workers Local 1645*, 362 F.2d 677, 681 (2d Cir. 1966), is particularly apt. Silence should not be and is not dispositive of the parties' intent in a labor contract. Giving the equivalent of *stare decisis* effect to prior arbitration decisions should be compelled by an express clause in the contract, *see Metropolitan Edison Co. v. NLRB*, 663 F.2d 478, 484 (3d Cir. 1981), *cert. granted*, __ U.S. __, 102 S.Ct. 2926, 73 L.Ed.2d 1327 (1982); *Riverboat Casino, Inc. v. Local Joint Executive Board*, 578 F.2d 250, 251 (9th Cir. 1978), not read into a contract by a court far removed from the negotiations. As this court said recently in a case of direct

judicial enforcement of an arbitration award not involving an unfair labor practice charge: "Whether there is a 'law of the contract' between the parties once an arbitrator decides an issue and what effect, if any, is to be given precedent are not primarily, if at all, questions for judicial resolution." *New Orleans Steamship Association*, 626 F.2d at 468.

[12] Beyond the impropriety of a court's reading into the silence of the 1977 contract a *stare decisis* clause, we detect additional evidence that such a clause would be incompatible with the contract as written. Article 23.02 permits all arbitration over disciplinary action to proceed through an expedited arbitration process. Under that process:

> E. The umpire's decision shall apply only to the instant grievance, which shall be settled thereby. It shall not constitute a precedent for other cases or grievances and may not be cited or used as a precedent in other arbitration matters between the parties unless the decision or a modification thereof is adopted by the written concurrence of the representatives of each party at the fourth step of the grievance procedure.
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> ....
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> H. The umpire shall have no authority to add to, subtract from, or modify any provisions of this Agreement.

It would be strange indeed for the 1977 contract to incorporate the 1974 arbitration decision by silence while

requiring the express written approval of the parties before giving precedential effect to disciplinary decisions under the expedited arbitration process during its own existence. Article 23.02 demonstrates to us that in the 1977 contract when the parties agreed to a particular arbitration procedure, they expressly so stated; when they had no agreement, they said nothing. Thus there was no "meeting of the minds" over the effect of the 1974 decision, and this court should not substitute its judgment for that of the parties.

Finally, permitting ratification or incorporation, whether express or implicit, of an arbitration decision also involving an unfair labor practice and judicially mandating Board adherence to it would circumvent the express policy of 29 U.S.C. § 160(a), which gives the Board the exclusive power to decide unfair labor practice questions.

We conclude that ratification or incorporation by silence of the 1974 arbitration decision is not permitted by principles of labor law contract interpretation, the structure of the 1977 contract, and section 160(a). The Board properly exercised its discretion in not deferring to the 1974 decision.

*Summary*

If this court were to declare the 1974 decision binding on the Board, we would open a loophole in section 160(a) that would render private resolutions of unfair labor

practices insulated from Board scrutiny and immune from evaluation under *Spielberg* or other criteria established by the Board.

[13] As the court in *NLRB v. Huttig Sash & Door Co.*, 377 F.2d 964 (8th Cir. 1967) (Blackmun, J.) said, "of itself, neither the presence of a problem of contract interpretation nor the presence of an arbitration provision in the contract deprives the Board of jurisdiction." *Id.* at 969 (interpreting *Acme, supra, and NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 87 S.Ct. 559, 17 L.Ed.2d 486 (1967)). Further, the Supreme Court has held that if the Board disagrees with an arbiter's conclusion in an unfair labor practice controversy, "the Board's ruling would, of course, take precedence." *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272, 84 S.Ct. 401, 409, 11 L.Ed.2d 320 (1964). The Board here was squarely presented with an issue within its unfair labor practice jurisdiction and neither the necessity of interpreting the labor contract nor the existence of an arbitration award interpreting the relevant contract provisions bars the Board from asserting its jurisdiction; interpreting the contract in accordance with the Act, and declining to follow the 1974 decision. Only the Board has the power to surrender its section 160(a) jurisdiction. Parties to a labor contract may not oust the Board's statutory jurisdiction or obviate its public law duties by private fiat. *See, e.g., Railway Clerks*, 498 F.2d at 1109; *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 803 (5th Cir. 1973); Stone, *The Post-war Paradigm in American Labor Law*, 90 Yale L.J. 1509, 1531-35 (1981).

## III. DISPARATE DISCIPLINE OF UNION OFFICERS.

[14] Section 8(a)(3) of the Act prohibits employers from discriminating against employees with respect to "any term or condition of employment to encourage or discourage membership in any labor organization." It is well established that " 'membership' as used in section 8(a)(3) refers not only to the employee's basic decision whether to join or remain in a union, but also to his decision as to the level of his participation in the union and union activities." *Teamsters, Local 20 v. NLRB,* 610 F.2d 991, 993 (D.C.Cir.1979), *citing Radio Officers Union v. NLRB,* 347 U.S. 17, 39-42, 74 S.Ct. 323, 335-337, 98 L.Ed. 455 (1954); *see also United Association of Journeymen and Apprentices v. Borden,* 373 U.S. 690, 695, 83 S.Ct. 1423, 1426 10 L.Ed.2d 638 (1963). Because holding union office is the "essence of protected union activities," *General Motors Corp.,* 218 N.L.R.B 472, 477 (1975), *enf'd mem.,* 535 F.2d 1246 (3d Cir. 1976), section 8(a)(3) prohibits employer discrimination against union officers based solely on their status. *Hammermill Paper Co. v. NLRB,* 658 F.2d 155, 163 (3d Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3622 (U.S. Jan. 29, 1982) (No. 81-1438).

[15] Section 8(a)(1) makes it an unfair labor practice to "interfere with, restrain or coerce employees in the exercise" of their section 7 rights. Section 7 provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...." 29 U.S.C. § 157 (1976). Section 8(a)(2)-(5) was intended by Congress to be a nonexhaustive list of four specific types of employer behavior barred by section 8(a)(1).[9] Thus, a violation of any of section 8(a)(2)-(5) also constitutes a violation of section 8(a)(1).

[16] From sections 7, and 8(a)(1) and (3) thus emerges a strong congressional policy mandating the protection of union officers from interference and coercion by an employer. Of course, such congressionally granted fundamental rights may be bargained away in a contract by a union. *See NLRB v. Magnavox Co.*, 415 U.S. 322, 94 S.Ct. 1099, 39 L.Ed.2d 358 (1974); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956).

[17] Bell correctly argues that the Act and the circuits that have considered the question permit disparate disciplining of union officers. However, it fails to point out that such discipline cannot be based on mere status but must be based on clear and specific contractual language,

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[9] The House Committee Report on the Act declared:

> The succeeding unfair labor practices are intended to amplify and state more specifically certain types of interference and restraint that experience has proved require such amplification and specification. These specific practices, as enumerated in subsections (2), (3), (4), and (5), are not intended to limit in any way the interpretation of the general provisions of subsection (1).

H.R.Rep.No.969, 74th Cong., 1st Sess. 15 (1935).

*see, e.g., Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3d Cir. 1981), *cert. granted*, __ U.S. __, 102 S.Ct. 2926, 73 L.Ed.2d 1327 (1982); *C. H. Heist Co. v. NLRB*, 657 F.2d 178 (7th Cir. 1981). This circuit has long held that contractual waivers of such fundamental statutory rights must be "clear and unmistakable." *Prudential Insurance Co. v. NLRB*, 661 F.2d 398, 401 (5th Cir. 1981), *quoting NLRB v. Item Co.*, 220 F.2d 956, 958-59 (5th Cir.), *cert. denied*, 350 U.S. 836, 76 S.Ct. 73, 100 L.Ed. 746 (1955).

In determining whether the contractual clauses at issue here are "clear and unmistakable" waivers, we travel a path well lit by precedent.[10] At one end of the spectrum, the specificity required to support disparate discipline is illustrated by *Gould, Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979), *cert. denied sub nom. Moran v. Gould Corp.*, 449 U.S. 890, 101 S.Ct. 247, 66 L.Ed.2d 115 (1980), where the following contractual provisions were deemed adequate to support disparate punishment of a steward:

> Section 1. For the duration of this Agreement, and except for the failure of the Company or the Union to comply with the arbitration provisions of the Agreement, the Union agrees that it shall not call, sanction, or engage in any strike, slow-

[10] We note, as the Board did below, *see* 254 N.L.R.B. at 317 n.3, that this case involves no instigation or leadership of the strike, merely participation. The stewards here, the stipulated facts show, behaved no differently than the nonofficer strikers. Cases of union officer instigation or leadership of illegal strikes are treated differently by the Board. *See, e.g., Midwest Precision Castings*, 244 N.L.R.B. 597 (1979). The cases we are guided by involved no instigation or leadership.

down or stoppage of work; and the Company agrees that it shall not cause or engage in any lockout.

Section 2. Any employee or employees, either individually or collectively, who shall cause or take part in any illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work during the life of this Agreement may be disciplined or discharged by the Company. It is recognized that any such action by the Company shall be subject to the Grievance Procedure.

Section 3. In the event of an illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work, *the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following:*

*Within not more than twenty-four (24) hours after the occurrence of any such unauthorized action, the Union, its officers and representatives shall publicly disavow same by posting a notice on the bulletin boards throughout the plant. The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence of any wild-cat picket line. The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action. The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.*

*Id.* at 730 n.3 (emphasis added).

In *Gould*, shop steward Moran participated in an illegal strike. Of the illegal strikers, only he was discharged. The court upheld this disparate discipline since Moran did nothing to fulfill his express section 3 obligation to take affirmative steps to end the illegal strike. *Id.* at 733.

The other end of the spectrum is illustrated by *Metropolitan Edison*, where this general no-strike clause was held insufficient to justify disparate treatment:

> The Brotherhood and its members agree that... there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public.

663 F.2d at 480. *Metropolitan Edison* involved the president, vice president, and members of a union who refused to cross the picket line of another union to reach their work site. One hundred thirty-five members received five- or ten-day suspensions, while the president and vice president received twenty-five-day suspensions for refusing to cross the picket line. The court held that since the contract imposed no duty on them to halt an illegal work stoppage, the disparate discipline was an unfair labor practice. *Id.* at 483; *see also Heist, supra; Hammermill*, 658 F.2d at 163.[11]

[11] Bell urges us also to consider the case of *Fournelle v. NLRB*, 670 F.2d 331 (D.C.Cir.1982). However, *Fournelle* is inapplicable since the contract clause at issue there was far broader than the standard no-strike clause present here. *See id.* at 333-34. Judge Edwards specifically excluded cases such as ours from consideration in *Fournelle*. *See id.* at 338 & n.15.

[18,19] From these cases, the guiding principle is clear: absent specific contractual obligations to the contrary, union officers may not be disparately disciplined for mere participation in or the failure to take affirmative steps to end an illegal stoppage.[12] It is clear to us that

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[12] The rationale for this principle was well summarized recently by a commentator:

> In the day-to-day conduct of their job, union officers cannot be said to feel a greater duty to their employers by virtue of their union status. After all, they owe their offices to the union and its members; their duty and loyalty extend to those people. The union officer frequently must act in the employer's interest, but largely because both union and employer have real interests in the enforcement of their collective bargaining agreement. When the [officer] is pressed, though, it will usually be the employer's interests which give way. The imposition of duties owed by the officer to the employer, absent explicit contractual provision for them, would merely create a legal standard which would be honored in the breach more often than not.
>
> Moreover, the inference of duties by the Board and the courts, rather than the explicit creation of duties by the parties themselves, would violate basic principles of agency law. The law has long imposed upon the agent "a duty to his principal to act *solely* for the benefit of the principal in all matters connected with his agency." In short, the special duties of union officers are owed to the union, not the employer. The duty requires the agent to act in accord with the principal's instruction on all "matters entrusted to him on account of the principal.... If a contract contains a no-strike clause, then in all likelihood a union officer's refusal to head off a wildcat strike will be a breach of duty to the union. But, since "[a]n agent is not liable for a harm to a person other than his principal because of his failure adequately to perform his duties to his principal," only the union may complain of the officer's nonfeasance. If the employer has a complaint, it must be directed at the union.
>
> On the other hand, as the Board...recognizes, if the officer participates in, leads or encourages a work stoppage, the officer, when viewed as an *employee*, has violated a duty to the

articles 21.05A and 28.01 fall well short of imposing specific duties on union officers in the event of an illegal strike and thus are not a "clear and unmistakable" waiver of their protected status. Article 21.05A is merely a general no-strike clause that imposes no specific duties on any individual. *See Metropolitan Edison, supra.* Article 28.01's statement that the Union and its representatives will "apply" the terms of the contract does not rise to the level of specificity required by *Gould.* It is no more than a general mutual pledge that cannot be the source of the specific waiver *Prudential Insurance* requires.[13]

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(Footnote 12 continued)

> employer, as well as to the union. Similarly, if an officer/employee disregards a specific contractual provision creating a duty owed by the officer as an employee, that employee has violated a duty owed to the employer. Discipline on this basis derives from officers' failure to fulfill responsibilities as employees rather than from their special roles as union representatives.
>
> Since the presumptions of the Act and basic agency law run counter to the inference of special duties, their existence should not be inferred. By requiring mutual and explicit definition of the duties which a union officer owes to the employer, troublesome reliance on implied and undefined duties can be eliminated. As such, the likelihood of arbitrary and discriminatory discipline will be diminished.

Rummage, *Union Officers and Wildcat Strikes: Freedom from Discriminatory Discipline,* 4 Indus.Rel.L.J. 258, 284-86 (1981) (footnotes omitted; emphasis original).

[13] We note as well, however, that just as a worker who is also a union officer may not be punished more severely than others because of that dual status, neither need he be favored. Even in the absence of a contractual provision, where an offender's knowledge and experience are properly relevant to discipline, they become no less so by reason of having accrued during or through his holding of union office.

Thus, although we disapprove the Board's *per se* rule in this area, the Board's conclusion that the disparate discipline here constituted an unfair labor practice was correct.

## IV. CONCLUSION

Because the Board was correct in not deferring to the 1974 arbitration and in deciding the unfair labor practice issue, its application for enforcement of its order is granted.

ORDER ENFORCED.

## APPENDIX "B"

**South Central Bell Telephone Company *and* Communications Workers of America, AFL-CIO.**
**Case 5-CA-7421**

January 14, 1981

### DECISION AND ORDER

### BY CHARIMAN FANNING AND MEMBERS JENKINS AND PENELLO

Upon a charge filed on September 10, 1979, by Communications Workers of America, AFL-CIO (herein called the Union), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 15, issued a complaint dated February 13, 1980, and an amended complaint dated February 20, 1980, against South Central Bell Telephone Company (herein called Respondent). The amended complaint alleged that Respondent violated Section 8(a)(1) and (3) of the Act by disciplining five named union stewards more severely than other employees who had called in sick, because of their status as union representatives.

Copies of the charge and of the complaint, amended complaint, and notice of hearing were duly served on Respondent and the Union. On February 27, 1980, Respondent filed an answer to the amended complaint, denying the commission of any unfair labor practices.

On various dates in June 1980, the parties executed a stipulation of facts and a motion to transfer proceeding to the Board, wherein they waived a hearing before an administrative law judge and agreed to submit the case to the Board for findings of fact, conclusions of law, and a Decision and Order based on a record consisting of the stipulation of facts and attached exhibits. On July 16, 1980, the Board issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel, Respondent,[1] and the Union filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the basis of the stipulation, the briefs, and the entire record in this proceeding, the Board makes the following findings:

## I. JURISDICTION

Respondent is now, and has been at all times material herein, engaged in the business of providing telecommunications services within the States of Louisiana, Kentucky, Mississippi, Tennessee, and Alabama, as

[1] Respondent has requested oral argument. This request is hereby denied inasmuch as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

1 of 19 companies associated with American Telephone and Telegraph, with its principal offices located in Birmingham, Alabama. The only facility involved in this case is Respondent's facility located in Hammond, Louisiana. During the past 12 months, a representative period, Respondent had gross revenues in excess of $1 million. During this same period, Respondent purchased and received goods valued in excess of $50,000 for use at its Louisiana facilities directly from sources located outside the State of Louisiana. The parties stipulated, and we find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The Stipulated Facts*

Respondent and the Union were parties to a collective-bargaining agreement effective August 7, 1977, to August 9, 1980, which covered, *inter alia*, the employees employed at Respondent's Hammond, Louisiana, facility. This contract contained the following provisions:

ARTICLE 21

ADJUSTMENT OF GRIEVANCES

* * * * * *

21.05 A. As the parties have agreed on procedures for handling complaints and grievances, they further agree that there will be no lockouts or strikes during the life of this Agreement.

* * * * * *

ARTICLE 28

RESPONSIBLE UNION-COMPANY RELATIONSHIP

28.01 The Company and the Union recognize that it is in the best interests of both parties, the employees and the public that all dealings between them continue to be characterized by mutual responsibility and respect. To insure that this relationship continues and improves, the Company and the Union and their respective representatives at all levels will apply the terms of this Contract fairly in accord with its intent and meaning and consistent with the Union's status as exclusive bargaining representative of all employees in the unit. Each party shall bring to the attention of all employees in the unit, including new hires, their purpose to conduct themselves in a spirit of responsibility and respect and of the measures they have agreed upon to insure adherence to this purpose.

On July 31, 1979, 21 of 23 unit employees who were scheduled to report to work at respondent's Hammond,

Louisiana, facility called in sick. On August 1, 1979, 19 of 23 employees who were scheduled to work at the Hammond facility again called in sick. Respondent believed that these employees were engaged in an unprotected strike in violation of the contractual no-strike provision. Therefore, Respondent gave 2-day suspensions to all employees who were absent only on July 31, gave 4-day suspensions to all employees who were absent on both July 31 and August 1, and gave additional 5-day suspensions on top of the 2- or 4-day suspensions to five union stewards who had been absent on one or both of those days. Thus, Union Stewards George Blades, Mike Jenkins, Ronny Neal, and Gary Stanga each received 9-day suspensions, and Union Steward Sidney Alexander received a 7-day suspension. The suspension notices given to all rank-and-file employees stated:

> [Name of employee] was suspended for [number] days from [date] to [date] for his participation in an unauthorized walkout. He is advised that further occurrences of this nature will result in discharge, barring unusual mitigating circumstances.

The suspension notices given to all five union stewards contained the above language, with an additional sentence stating: "The fact that [name of employee] is a union representative was taken into account in determining the length of the suspension."

On at least one previous occasion, in 1973, Respondent had imposed longer suspensions on union stewards

who participated in a strike in violation of the contractual no-strike clause than on rank-and-file employees who also participated. An arbitrator found Respondent's imposition of more severe discipline on the union stewards in that case to be warranted because of the stewards' higher degree of responsibility than other employees during illegal work stoppages.

B. *Contentions of the Parties*

The General Counsel and the Union contend that Respondent imposed more severe discipline on the five union stewards solely because of their status as union officials, thus discriminating against them in violation of Section 8(a)(3) of the Act. They note that there is no evidence the five union stewards urged support of or sought to induce employee participation in the sickout and that the collective-bargaining agreement does not require the Union or its officials to take affirmative steps to prevent or end unauthorized work stoppages. Therefore, they contend that since the stewards merely participated in the work stoppage along with other employees, Respondent unlawfully based its more severe penalties for the stewards on the stewards' union status rather than on any conduct by the stewards differentiating the stewards from other employees. Finally, they contend that the previous arbitration decision upholding greater discipline for stewards is not controlling inasmuch as it was not based on any particular contract provisions and its holding is repugnant to the Act.

Respondent contends that the Union has agreed to perform certain obligations under the contract, including the enforcement of the no-strike provision, and that it was entitled to discipline the union stewards for breaching their responsibility as union officials to abide by the contract. Respondent notes that employees reasonably depend upon the stewards to advise them on matters of contract interpretation and that, therefore, the stewards' actions in participating in an unprotected strike may properly be characterized as overt acts in condonation and leadership of the illegal work stoppage. Respondent urges the Board to overrule its recent cases finding that greater discipline of union officers for participating in illegal strikes is discriminatory under Section 8(a)(3) of the Act, noting that the Board's policy is disruptive of established collective-bargaining relationships and does not take into account the parties' agreement as to their responsibilities under the contract. Finally, respondent contends that the express language of the contract as well as the previous arbitration decision clearly indicate the Union agreed to allow Respondent to discipline stewards more severely than other employees for participating in such a strike in violation of the contract and that such a waiver of the stewards' rights is not repugnant to the Act.

### C. *Analysis and Conclusions*

The Board has held that it is a violation of Section 8(a)(3) and (1) of the Act for an employer to single out union stewards for discipline where the stewards merely par-

ticipated in an unprotected strike along with other employees.[2] In so concluding, the Board reasoned that such different treatment of stewards must necessarily be based upon the stewards' status as union officers rather than upon their conduct as employees, since the stewards had engaged in the same actions as other employees. The Board held that, where a steward had not instigated or led an unprotected work stoppage, he could not be disciplined for his "lack of actions as a steward" in failing to take steps to terminate the work stoppage.[3] We continue to adhere to this analysis of the law.

In this case, Respondent admittedly imposed longer suspensions on the five union stewards who participated in the sickout than on other employees who also participated. Further, the suspension notices given to the five union stewards expressly indicated that the stewards' status as union representatives was the basis for their longer suspensions. There is no evidence in the record to indicate that the five union stewards engaged in any activities different from those engaged in by other employees, such as urging support of or seeking to induce employees to par-

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[2] *Bethlehem Steel Corporation*, 252 NLRB No. 138 (1980); *Gould Corporation*, 237 NLRB 881 (1978), enforcement denied 612 F.2d 728 (3d Cir., 1979); *Precision Castings Company, Division of Aurora, a wholly-owned subsidiary of Allied Products Corporation*, 233 NLRD 183 (1977).

[3] *Gould Corporation, supra* at 881. Cf. *Midwest Precision Castings Company*, 244 NLRB 597 (1979), however, where the Board held that an employer did not violate the Act by holding a steward to a higher standard of conduct than other employees in disciplining the steward for urging support of and inducing employee participation in an unauthorized, illegal work slowdown.

ticipate in the work stoppage. Rather, the evidence indicates that the five union stewards merely participated in the work stoppage along with most of the other employees. Thus, Respondent clearly singled out the five union stewards for different treatment than other employees, based solely upon their status as union representatives, and thereby violated Section 8(a)(3) and (1) of the Act.[4]

## IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily imposed longer disciplinary suspensions on Sidney Alexander, George Blades, Mike Jenkins, Ronny Neal, and Gary Stanga, than on other employees who participated in the work stoppage of July 31 and August 1, 1979, we shall order that Respondent rescind its discipline of Alexander, Blades, Jenkins, Neal, and Stanga only to the extent that their suspensions exceeded those imposed on other employees.[5] We shall also order Respondent to make the

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[4] Despite Respondent's contention, we see no reason to give deference to the prior arbitration decision finding Respondent's actions proper under the contract. *See Indiana & Michigan Electric Company*, 237 NLRB 226 (1978), enforcement denied 599 F.2d 227 (7th Cir. 1979).I

[5] See *Miller Brewing Company*, 254 NLRB No. 24 (1980). For the reasons set forth in his concurring opinion in *Miller Brewing Company*, *supra*, Member Jenkins would order Respondent to rescind the entire

above-named employees whole for any loss of earnings or other benefits they suffered as a result of the discrimination against them. Backpay shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

## CONCLUSIONS OF LAW

1. Respondent South Central Bell Telephone Company is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Communications Workers of America, AFL-CIO, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending Sidney Alexander, George Blades, Mike Jenkins, Ronny Neal, and Gary Stanga for 5 days longer than other employees who participated in the work stoppage of July 31 and August 1, 1979, solely because they were union representatives, Respondent has violated Section 8(a)(3) and (1) of the Act.

(4). Respondent's violations of Section 8(a)(3) and (1)

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(Footnote 5 continued)
discipline imposed on the five union stewards rather than just the protion of their suspensions which exceeded those imposed on rank-and-file employees.

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, South Central Bell Telephone Company, Hammond, Louisiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against its employees by giving more severe discipline to union stewards than to other employees because of their status as union representatives.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Rescind the discriminatory suspensions given to Sidney Alexander, George Blades, Mike Jenkins, Ronny Neal, and Gary Stanga for their participation in the work stoppage of July 31 and August 1, 1979, and expunge from their records any reference to those suspensions.

(b) Make Sidney Alexander, George Blades, Mike Jenkins, Ronny Neal, and Gary Stanga whole for any loss of earnings or other benefits they suffered as a result of the discrimination against them, in the manner set forth in "The Remedy" section of this Decision.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Hammond, Louisiana, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 15, in

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

MEMBER PENELLO, dissenting:

Contrary to my colleagues, I would dismiss the complaint in this case. I would find that Respondent did not violate section 8(a)(3) and (1) of the Act by disciplining Union Stewards Alexander, Blades, Jenkins, Neal, and Stanga more severely than other employees who participated in an unprotected work stoppage, since they had a higher duty as union officials to enforce the contractual no-strike provision.

I continue to adhere to my analysis of the law as set forth in my dissenting opinion in *Gould Corporation*, 237 NLRB 881 (1978), enforcement denied 612 F.2d 728 (3d Cir. 1979), and in my concurring opinion in *Midwest Precision Castings Company*, 244 NLRB 597 (1979).[8] As I emphasized in those opinions, my view is that a union official who acquires a battery of "benefits and protections" because of his position with the union must also be held accountable to fulfill certain "duties and responsibilities" inherent in that position of authority and that foremost among those "duties and responsibilities" is the enforcement of a no-strike clause in a collective-bargaining agreement. Thus, I concluded that an employer could lawfully hold a union official to a higher standard of conduct than other employees

[8] See also my dissenting opinions in *Bethlehem Steel Corporation*, 252 NLRB No. 138 (1980), and *Metropolitan Edison Company*, 252 NLRB No. 147 (1980).

because of the official's responsibilities under the contract.[9]

In this case, there is no dispute that the five union stewards participated in an unprotected "sickout." Further, there is no evidence that the stewards ever made any attempt to get the employees to end the work stoppage. In light of these facts, I would find that the stewards breached their primary responsibility as union officials to enforce the contract, by participating in a work stoppage in violation of the no-strike clause of the contract and thereby effectively demonstrating the Union's approval of the employees' illegal action. I would, therefore, find that Respondent acted lawfully in holding them to a higher standard of conduct and disciplining them more harshly than other employees who participated in the illegal work stoppage.

Accordingly, I dissent.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered

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[9] See also *Indiana & Michigan Electric Company v. N.L.R.B.*, 599 F.2d 227 (7th Cir. 1979), denying enforcement of 237 NLRB 226 (1978).

us to post this notice. We therefore notify you that:

WE WILL NOT discriminate against our employees by giving more severe discipline to union stewards than to other employees because of their status as union representatives.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL rescind the discriminatory suspensions given to Sidney Alexander, George Blades, Mike Jenkins, Ronny Neal, and Gary Stanga for their participation in the work stoppage of July 31 and August 1, 1979, and expunge from their records any reference to those suspensions.

WE WILL make Sidney Alexander, George Blades, Mike Jenkins, Ronny Neal, and Gary Stanga whole for any loss of earnings or other benefits they suffered as a result of our discrimination against them, together with interest.

SOUTH CENTRAL BELL TELEPHONE COMPANY

**APPENDIX "C"**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 81-4159**

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**NATIONAL LABOR RELATIONS BOARD,**

**Petitioner,**

**versus**

**SOUTH CENTRAL BELL TELEPHONE COMPANY,**

**Respondent.**

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**Application for Enforcement of an Order of the National Labor Relations Board**

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**ON PETITION FOR REHEARING**

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**(NOVEMBER 2, 1982)**

**Before BROWN, GEE and GARWOOD, Circuit Judges.**

**PER CURIAM:**

**IT IS ORDERED that the petition for rehearing filed in the above titled and numbered cause be and the same is hereby denied.**

ENTERED FOR THE COURT:

_____

United States Circuit Judge

No. 82-1016

# In the Supreme Court of the United States

OCTOBER TERM, 1982

SOUTH CENTRAL BELL TELEPHONE COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

REX E. LEE
*Solicitor General*
*Department of Justice*
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*General Counsel*
*National Labor Relations Board*
*Washington, D.C. 20570*

## TABLE OF AUTHORITIES

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-1016

SOUTH CENTRAL BELL TELEPHONE COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD**

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1. In this case the Board found (Pet. App. A28-A42) that petitioner South Central Bell Telephone Company violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), when it disciplined five employees holding union office more severely than it did other employees for identical conduct that petitioner deemed a violation of the no-strike clause of the collective bargaining agreement. In reaching this conclusion, the Board applied its rule that, while employers are free to discipline any employee, *including* any employee who holds union office, for violating a no-strike clause, and may also punish acts of actual strike leadership more severely than mere participation, they are barred by Section 8(a)(3) and (1) of the Act from predicating harsher discipline simply on an employee's status as a union officer.

Here, the Board found (Pet. App. A35-A36) (1) that petitioner imposed suspensions on five union stewards that exceeded by five days the suspensions imposed on other employees who engaged in a walkout for the same periods of time, (2) that the stewards had not induced the work stoppage, and (3) that petitioner expressly predicated the longer suspensions on the employees' status as union stewards. The Board rejected petitioner's contention that the additional suspensions were privileged by a provision of the collective bargaining agreement, construed in the light of an arbitral construction of an identical clause in a prior agreement (Pet. App. A36 n.4). Accordingly, the Board concluded that petitioner had unlawfully discriminated against the stewards on the basis of union-related considerations.

2. The court of appeals enforced the Board's order (Pet. App. A1-A27). It rejected what it characterized(*id.* at A14) as the Board's *per se* rule "that disparate discipline can *never* be imposed, even if [employees who are union] officers flout affirmative contractual obligations" (emphasis in original). It nonetheless upheld the Board's conclusion that the extra suspensions at issue violated Section 8(a)(3) and (1) of the Act, because it concluded (Pet. App. A20-A27) (1) that the discipline in question would be unlawfully discriminatory unless the union had contractually waived the union officers' statutory protection against such disparate treatment and (2) that the general no-strike clause on which petitioner relied was not sufficiently "clear and unmistakable" to constitute a surrender of the statutory right. The Court also rejected petitioner's contention that an earlier arbitrator's decision construing an identical no-strike clause as permitting increased discipline of union officers for violating the clause was binding on the Board (*id.* at A6-A9).

## DISCUSSION

As petitioner concedes (Pet. 5) the issues decided by the court of appeals in this case "are presently pending before this Court" in *Metropolitan Edison Co.* v. *NLRB*, cert. granted, No. 81-1664 (June 14, 1982) (argued Jan. 11, 1983). Those are the issues presented in Questions 1 and 2 of the petition. As to those questions, the petition should be held and disposed of in light of this Court's decision in *Metropolitan Edison Co.*

The third question presented by the petition (at i) — whether the court of appeals "erred in affirming the [Board's] decision on a ground not relied upon by the Board rather than remanding the case to the Board for further proceedings in light of the rule enunciated by the [court]" —does not merit review by this Court. Even assuming that, under the *Chenery* doctrine, which bars a court from upholding an administrative order on grounds different from those relied on by the administrative agency,[1] the court of appeals erred in failing to remand to the Board the question whether there was a clear and unmistakable waiver of statutory rights, there is little to be gained by granting the petition and directing a remand now, merely to correct such a procedural error. The court of appeals' conclusion that the general no-strike clause, together with the arbitrators' construction of it, did not constitute a clear and unmistakable waiver of statutory rights is entirely consistent with the Board's view of a similar waiver contention in *Metropolitan Edison Co.*, 252 N.L.R.B. 1030, 1035 (1980) — the decision now on review in this Court.[2] See also *Consolidation Coal*

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[1] *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943). Accord, *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 672 n. 6 (1981).

[2] The Board there held that, even assuming the statutory right in question could be waived, the no-strike clause, as construed in light of prior arbitral awards, did not constitute a "clear and unmistakable waiver."

*Co.*, 263 N.L.R.B. No. 188, 111 L.R.R.M. (BNA) 1205 (Sept. 20, 1982). In these circumstances, a remand would serve no useful purpose. See *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969).

It is therefore respectfully submitted that the petition for a writ of certiorari should be held and disposed of in light of the Court's decision in *Metropolitan Edison Co.* v. *NLRB*, No. 81-1664.[3]

Respectfully submitted.

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[3]A copy of the Board's brief in *Metropolitan Edison Co.* is being served on petitioner.